IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF GEORGIA,	)	
Plaintiff,	)	Civil Action
	)	No. 1:01 CV 02111 (EGS HTE LFO)
v.	)	
	)	3-Judge Court
JOHN ASHCROFT, et. al.,	)	
Defendants.	)	

UNITED STATES' RESPONSE TO ORDER TO SHOW CAUSE

I. INTRODUCTION

This case is on remand following the decision of the United States Supreme Court in Georgia v. Ashcroft, 539 U.S. __, 123 S. Ct. 2498 (2003). In April 2002 this Court had denied preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, for a 2001 redistricting plan for the Georgia State Senate. Georgia v. Ashcroft, 195 F.Supp.2d 25 (D.D.C. 2002)(three-judge court). The Supreme Court vacated this Court's 2002 decision and remanded the case "for the District Court to examine the facts using the standard that [the Supreme Court] announce[d] . . . ," leaving it "for the District Court to determine whether Georgia has indeed met its burden of proof." 123 S. Ct. at 2516-2517.

By Order of August 20, this Court ordered the Defendants to show cause why judgment should not be entered for Plaintiff. The United States respectfully submits that the present record is clearly insufficient to permit entry of judgment for the Plaintiff. The Supreme Court's decision significantly expanded the scope of facts vital to determining whether retrogression has occurred, and many of these facts have neither been presented to, nor considered by, the Court under the

revised standard of retrogression. There is also factual information relevant to this determination that has come into existence since this Court's 2002 decision that precludes the Court from entering judgment for the Plaintiff. Instead, for the reasons discussed below, the Court should reopen discovery to produce a full evidentiary record pertinent to the revised standard of retrogression set forth by the Supreme Court. Otherwise, on the present record the Plaintiff clearly has not met its burden of proof under the revised Supreme Court standard and summary judgment should be granted to the United States.

II. REVISED LEGAL STANDARDS FOR RETROGRESSION

This Court's previous decision, relying upon Beer v. United States, 425 U.S. 130 (1976), focused on whether there had been a diminution in the overall number of senate districts in which minority voters could elect candidates of their choice. The revised legal standards announced by the Supreme Court build upon the basic retrogression analysis from Beer.1/ Thus, "the ability of a minority group to elect a candidate of choice remains an integral feature in any [Section 5] analysis." 123 S. Ct. at 2513-14. Similarly, the existence of racially polarized voting patterns also remains important. Id. at 2514. But, the Supreme Court identified several additional factors that need to be examined as part of the newly-enunciated "totality of the circumstances" inquiry, which is central to the retrogression determination under Section 5.2/

1/ The Supreme Court acknowledged that it had not previously defined "effective exercise of the electoral franchise" as applied to the Section 5 retrogression standard. 123 S. Ct. at 2511 (quoting Beer v. United States, 425 U.S. at 141).

2/ The phrase "totality of the circumstances" here is used in a different context and requires review of different factors than that which appears in the text of Section 2 of the Voting Rights Act, 42 U.S.C. 1973. In Georgia v. Ashcroft the Supreme Court explicitly reaffirmed its previous holdings that Section 5 preclearance is governed by standards distinct from those

(continued...)

First, courts must assess the prospects for the "comparative ability of a minority group to elect a candidate of its choice", 123 S. Ct. at 2512, by examining whether reductions in previously "safe" districts are offset by an increased number of districts in which minority voters are at least "likely" to elect candidates of their choice.3/

Second, courts must consider the extent to which a proposed redistricting plan creates additional "influence" districts in which minority voters can provide a margin of victory for candidates who are "sympathetic to the interests of minority voters", id. at 2513, even if they are unable to elect a candidate of their choice in the district.4/ "In assessing the comparative weight of these influence districts, it is important to consider 'the likelihood that candidates elected without decisive minority support would be willing to take the minority's interest into account.'" Id. at 2512.

Third, courts must consider the extent to which the proposed redistricting plan would protect the "comparative position[s] of legislative leadership, influence, and power" for minority voters' candidates of choice elected from the majority-minority districts in the benchmark plan

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2/ (...continued)
Section 2. "We refuse to equate a § 2 vote dilution inquiry with the § 5 retrogression standard." 123 S. Ct. at 2510-11 (citing Reno v. Bossier Parish School Bd., 520 U.S. 471, 480 (1997)).

3/ "[A] State may choose to create a certain number of 'safe' districts, in which it is highly likely that minority voters will be able to elect the candidate of their choice. [Citations omitted]. Alternatively, a State may choose to create a greater number of districts in which it is likely – although perhaps not quite as likely as under the benchmark plan – that minority voters will be able to elect candidates of their choice." Id. at 2511 (emphasis added). The Supreme Court identifies districts of this latter type as providing "descriptive representation." Id. at 2512.

4/ "[A] court must examine whether a new plan adds or subtracts 'influence districts' – where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process." Id. at 2512 (emphasis added). The focus here is on what the Supreme Court referred to as "substantive representation."

and, in this same vein, "whether the representatives elected from the very districts created and protected by the Voting Rights Act support the new districting plan." Id. at 2513.5/

Ultimately, the Supreme Court decision provides states with additional "flexibility" and "choice" in drawing redistricting plans. But states still retain the burden of showing that their redistricting plans do not diminish the effective exercise of the franchise. A state may not meet its burden merely by showing that it hoped to avoid retrogression; it must instead show that in fact it has avoided retrogression.

III. THE RECORD IN THIS CASE PRECLUDES ENTRY OF JUDGMENT TO PLAINTIFF

Applying the revised standards set forth by the Supreme Court to the present record, Plaintiff has not met its burden under Section 5 to demonstrate that the proposed plan is not retrogressive, and preclearance is thus unwarranted at this time. Discovery should be reopened to permit full examination of the new factors made relevant to the retrogression inquiry by the Supreme Court's decision.

A. The Supreme Court's Decision Does Not Require Judgment For the Plaintiff

When a new legal standard is adopted by the Supreme Court, it has the option of applying the new standard itself, and deciding the case on the merits, or remanding the case for the lower court to apply the new standard. Casey v. Planned Parenthood, 14 F.3d 848, 857 (3rd Cir. 1994).

5/ "[O]ne other method of assessing the minority group's opportunity to participate in the political process is to examine the comparative position of legislative leadership, influence, and power for representatives of the benchmark majority-minority districts . . . . Maintaining or increasing legislative positions of power for minority voters' representatives of choice, while not dispositive by itself, can show the lack of retrogressive effect under [Section 5]." Id. at 2513.

Here, the Supreme Court expressly did not decide this case on the merits, remanding it for this court to decide:

> The dissent's analysis presumes that we are deciding that Georgia's Senate plan is not retrogressive.... To the contrary, we only hold that the District Court did not engage in the correct retrogression analysis because it focused too heavily on the ability of the minority group to elect a candidate of choice in majority-minority districts. While the District Court engaged in a thorough analysis of this issue, we must remand the case to the District Court to examine the facts using the standard that we announce today. We leave it for the District Court to determine whether Georgia has indeed met its burden.

123 S. Ct. at 2516-2517. If there had been only one possible conclusion to be drawn from the record, it would have been unnecessary for the Supreme Court to have remanded the case. While the Court may have made some observations regarding retrogression on the record before it, those views represent nothing more than *obiter dictum*; they do not compel judgment for the plaintiffs.6/

Moreover, the Supreme Court expressly accepted this Court's findings that proposed Districts 2, 12, and 26 reduced black voters' effective exercise of the electoral franchise.

> Like the dissent, we accept the District Court's findings that the reductions in black voting age population in proposed Districts 2, 12, and 26 to just over 50% make it marginally less likely that minority voters can elect a candidate of their choice in those districts . . . .

Id. at 2514-2515. This remains the law of the case, and the proposed senate plan therefore is not entitled to Section 5 preclearance unless there are sufficient offsetting increases in black voters'

6/ To be sure, the Supreme Court's decision included several statements that might be read to indicate no further proceedings are necessary. This Court quoted those passages in its August 20 Order to Show Cause at pages 2-3. For the reasons set forth below, however, the United States respectfully submits that these observations do not require an entry of judgment in favor of the Plaintiff. To the contrary, the present record is clearly insufficient to permit such a judgment at this time.

effective exercise of the electoral franchise. On remand, the burden clearly remains on the Plaintiff to demonstrate that the purported offset results in a plan that, overall, does not reduce minority voting strength.

In addition, the limited evidence in the record is due to the state of the law prior to the Supreme Court's decision. There was no basis in the previous decisions of either this Court or the Supreme Court to suggest that such factors as influence districts, legislative influence in the form of committee chairmanships, or the likely Democratic performance of proposed districts, were relevant to the Section 5 retrogression analysis of a legislative redistricting plan. As discussed in Subsection C below, the Supreme Court's change in the state of the law, and the fact that Georgia now has a legally enforceable plan in place, mandates that this Court reopen the record for further discovery and evidentiary proceedings -- within the scope of those revised standards -- before reaching a judgment on the merits.

B. **The Present Record Does Not Justify Section 5 Preclearance**

The new standards for retrogression set forth by the Supreme Court turn on factors other than the Black Voting Age Population ("BVAP") percentages of the districts, and it remains the burden of the State to supply that evidence if it is to attain preclearance. Under the current record the State has not met that burden.

In vacating and remanding this case, the Supreme Court emphasized that the fact that the BVAP percentage had increased within certain districts provided a potential offset for the retrogression in District 2, 12 and 26.7/ However, re-examination of all districts in the

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7/ The Supreme Court stated that this Court had erred in its conclusion that the State "did not 'present evidence regarding potential gains in minority voting strength in Senate Districts other (continued...)

benchmark and proposed plans in light of the new legal standards set forth by the Supreme Court shows that each district in the proposed senate plan that potentially provides "descriptive" representation already has an existing counterpart in the benchmark plan with an effectively equal (within one percentage point) or greater BVAP percentage under the 2000 data. Furthermore, each district in the proposed senate plan that potentially provides "substantive" representation has an existing counterpart -- within 6.8 percentage points under the 2000 data -- in the benchmark plan. See Attachments A and B. Thus, this remand does not present the factual question of how to weigh "new" or "additional" districts against the retrogression Districts 2, 12 and 26. Instead, this case presents the factually nuanced question of whether the slight increases in the black voting age population percentages evident in districts between 25 and 32 percent BVAP provide any cognizable gain in effective black voting strength. The present record does not answer that question.

Among the new factors identified by the Supreme Court, only the benefit that black incumbents sought to realize by protecting their partisan majority, and the fact that most black senators voted for the 2001 plan, might fairly be said to weigh in favor of preclearance based

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7/ (...continued)
than Districts 2, 12 and 26'", and by failing to "examine the increases in the black voting age population that occurred in many of the districts." Id. at 2514. Such increases, however, could be offset by decreases in other districts. Thus, although the BVAP increased by more than five percentage points within seven districts under the proposed plan, it decreased by more than five percentage points within 21 districts. Pl. Exh. 1D, 2D. Overall, the proposed plan reduces the BVAP percentage within 59 percent (33 of 56) of the districts in the proposed plan compared to the benchmark plan, even though the black share of the statewide VAP increased from 24.6 in 1990 to 26.7 percent in 2000. Id. Accordingly, the ultimate focus must be the relative distribution of minority voting strength between the benchmark and proposed plans -- taking into account the potential for meaningful gains in representation in districts below 50 percent BVAP.

upon the current record.8/ However, these latter two factors, which are "not dispositive", 123 S. Ct. at 2513, do not outweigh the lack of any significant net increase in the number of districts in which black voters can effectively participate in the political process.

In addition, the Court should avail itself of the opportunity to augment the record with information about the outcome of the 2002 elections, which, as discussed in Subsection C- below, shows clearly that many of the arguments and expectations of the black incumbents used to justify the proposed plan were ill-founded. This is particularly significant when weighing the support that the proposed plan received from black legislators. Following the 2002 election, the defeat of the Senate's black majority leader and defections by white Democrats cost black senators all of their committee chairmanships. This loss is a factor that must be considered by the Court under the Supreme Court's holding and on which further discovery is clearly warranted.

i. **Ability to Elect Candidates of Choice and Ability to Influence Elections**

The Court's reexamination of the record must begin with the Supreme Court's express acceptance of this Court's findings that proposed Districts 2, 12, and 26 reduced black voters' effective exercise of the electoral franchise. Therefore, because retrogression is assessed on the basis of the plan as a whole, Georgia must demonstrate that this loss of black voting strength has been offset elsewhere in its proposed plan if it is to receive preclearance. Although the Supreme

8/ The present record contains considerable evidence of the position of these representatives. It was fully considered and weighed in the 2002 decision with respect to retrogressive purpose, but has not been weighed and considered with respect to the "totality of circumstances" concerning retrogressive effect.

Court's opinion identified several means by which the State theoretically might do so, the present record does not reflect such offsets.

The evidence presently in the record to which the revised retrogression standards on "descriptive" and "substantive" representation can be applied is quite limited. As the Supreme Court noted, the record contains very little in the way of evidence regarding any district outside of Districts 2, 12, and 26. Such evidence consists principally of the black voting age percentage within each of the districts in the benchmark senate plan and the proposed 2001 plan.9/ Georgia -- with the one ambiguous exception cited below -- did not argue that it had created any "new" districts, "influence" or otherwise, that would offset those reductions. When presented at argument with the precise question regarding where black voters made any gains to offset the retrogression in Districts 2, 12, and 26, Plaintiff attempted to identify only District 34 as a possible offset:

> JUDGE EDWARDS: Does your argument included [sic] an argument that there has been compensatory regression [sic] in other Districts other than these disputed Districts to arguably overcome the de facto retrogression, and I am saying de facto as opposed to unlawful?
>
> MR. WALBERT: Thank you. Absolutely, Judge. In the House and the Congressional plan, that has certainly happened. Now in the Senate plan –
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> JUDGE EDWARDS: What about the Senate?
>
> MR. WALBERT: It has happened in one District, and I am falling short of the number now. I am thinking it is 34. There is a new African-American

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9/ Of course, the parties did not have the benefit of the Supreme Court's guidance when the current record was presented to this Court. Georgia's factual case was based upon the very different contention that the reductions in the majority-black senate districts were not retrogressive. In fact, Georgia repeatedly sought to limit the scope of evidence presented by all parties to evidence directly related to Districts 2, 12 and 26. See Plaintiff's Motion to Require Defendants to Specify Issues, December 5, 2001, p. 3, para. 9; Memorandum of Points and Authorities in Support of Plaintiff's Motion to Require Defendants to Specify Issues, December 5, 2001; Transcript of Status Conference, December 17, 2001, pp. 32-33; Plaintiff's Opposition to United States' Request to Defer Entry of Declaratory Relief, January 2, 2002, pp. 3-4.

> District, majority District that is an open seat. The incumbent is not running. I think that is 34. That has become a majority District. It was not before.

Transcript of Oral Argument, February 26, 2002, pp. 52-53, lines 21-10 (emphasis added).10/

Attachments A and B demonstrate, in tabular and graphic forms, respectively, the relative distributions of the BVAP percentages in the districts of the benchmark and proposed senate plans as reflected in the present record.11/ These Attachments place the districts in which there were increases in the BVAP percentage in the proper context; i.e., within the proposed plan as a whole as compared to the benchmark as a whole.

Reading Attachment B from left to right, from the most heavily-black to least heavily-black districts, it is immediately clear that the proposed plan creates no additional districts in which black voters are likely to elect candidates of their choice. The thirteen most heavily-black districts in the proposed senate plan range between 50.3 and 64.1 percent in BVAP. Among these districts, the twelve highest have lower BVAP percentages than the corresponding districts in the benchmark plan; only District 2, the thirteenth most heavily-black district in the proposed plan, has a higher BVAP percentage (50.3 percent) than the corresponding district in the benchmark plan (District 44, 49.6 percent BVAP), but that is only by a de minimis margin of less

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10/ That change to District 34, however, did not represent a net gain. It merely compensated for the reduction in BVAP in District 44 from 49.6 percent in the benchmark to 34.7 percent in the 2001 proposed plan. See Attachments A and B.

11/ For example, the district with the highest BVAP percentage in the benchmark plan, District 43, has a higher BVAP percentage than the district with the highest BVAP in the proposed plan, District 10. Similarly, the district with the tenth-highest BVAP percentage in the benchmark plan, District 36, has a higher BVAP percentage than the corresponding district in the proposed plan, District 26. See Attachment A; Plaintiff's Exhibits 1D, 2D. The 2000 Census data presented herein employ the tabulation of multiple-race responses that the Supreme Court found to be appropriate in cases in which only one principal minority group is at issue. See 123 S. Ct. at 2508 n.1.

than one percentage point. Therefore, the BVAP data do not show any increase in the number of possible "descriptive representation" districts under the proposed senate plan. To the contrary, there has been a clear, systematic net loss of black voting strength among the thirteen most heavily-black districts (by an average of 9.8 percentage points in BVAP), particularly when the retrogression in Districts 2, 12 and 26 is taken into account.

The nine next most heavily-black districts in the proposed plan (ranked numbers 14 to 22) range between 38.2 percent and 33.7 percent in BVAP. These are potentially the strongest candidates to be offsetting influence districts, and the Supreme Court's decision requires this Court to consider the possibility that the State may have chosen to "increas[e] the number of representatives sympathetic to the interests of minority voters" and thereby enhance substantive representation for black voters.12/ Id. at 2513. For each of these nine districts in the proposed plan, however, the BVAP percentage is either lower than, or essentially identical to (at most one percentage point greater), the district of corresponding rank in the benchmark plan. Therefore, on the basis of the BVAP statistics, none of these nine districts can be considered on this record to increase the number of potential influence districts relative to the benchmark plan.

The next eight most heavily-black districts in the proposed plan (ranked numbers 23 to 30) range from 25.2 to 33.1 percent BVAP. Because it is unlikely that any of the other 26 districts in the proposed plan that are below 25 percent in BVAP could be considered an influence district, by process of elimination it must be among the eight districts between 25.2 and 33.1 percent BVAP that Georgia must compensate, if at all, for the retrogression in Districts 2,

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12/ Nothing in the record suggests that a senate district in this range is likely to provide "descriptive representation" by permitting black voters to elect candidates of their choice.

12 and 26.13/ As shown in Attachments A and B, each of these eight districts shows only a marginal increase in BVAP compared to the corresponding districts of the benchmark plan, (an average increase in BVAP of 5.2 percentage points). Thus, based on the BVAP data in the present record, none of these eight districts represents a "new" influence district.14/

Admittedly, the specific local circumstances and voting patterns in the proposed districts ranging between 25 and 38 percent BVAP could in theory show an increase in actual black influence that is not evident from the bare BVAP percentages. The current record, however, does not provide such evidence. It is Georgia's burden of proof to make such a showing, and it has not done so.

13/ The Supreme Court's principal discussion of potential offsetting influence districts referred to districts with 25 percent BVAP and higher. 123 S. Ct. at 2515. The Supreme Court's decision refers at one other point to districts above 20 percent BVAP, but it is not clear from the context that those are meant to include potential influence districts. 123 S. Ct. at 2516.

14/ The Supreme Court also found it relevant that some districts in the proposed plan with BVAP's of approximately 50 percent did not have BVAP majorities under the benchmark plan when measured using "the census numbers in effect at the time the redistricting plan was passed," although they had developed BVAP's greater than 50 percent by the time of the 2000 Census. 123 S. Ct. at 2515. The 1990 data carry less weight, however, for several reasons. Generally, "[i]n § 5 preclearance proceedings ... the baseline is the status quo that is proposed to be changed . . . ." Reno v. Bossier Parish School Bd., 528 U.S. 320, 334 (2000) (Bossier II). The status quo normally is measured by reference to the most recent population data available. See City of Rome v. U. S., 446 U.S. 156, 186 (1980) (finding the "district court was correct in concluding that the cumulative effect of [] 13 annexations must be examined from the perspective of the most current available population data."); id. at 186 n.22 ("Current voting-age population data are probative because they indicate the electoral potential of the minority community."). In this case, there are additional factors for giving greater weight to the 2000 data. The benchmark plan was adopted in 1997 -- within three years of the 2000 Census, as opposed to seven years after the 1990 Census. Furthermore, the black share of statewide voting age population increased by 2.1 percentage points (from 24.6 percent to 26.7 percent) between 1990 and 2000; this is significant in light of the fact that each senate district represents about 1.8 percent (one fifty-sixth) of the state's population. See Pl. Exh. 1C.

ii. **Legislative Influence**

The Supreme Court noted that "[n]o party contests that a substantial majority of black voters in Georgia vote Democratic" and that "all elected black representatives in the General Assembly are Democrats." Id. at 2505. The Court further cites data from an index of "Democratic Performance" as evidence of the likelihood of electing a majority of Democrats in the plan, which would theoretically maintain the positions of leadership for black candidates of choice.

The United States does not contest that many of the black members of the Senate believed that the 2001 Plan would protect their committee chairmanships by preserving Democratic control of the Senate, or that in some cases they relied upon the "Democratic Performance" index in arriving at that conclusion. However, the United States does dispute that (i) the interests of minority voters are limited to the election of Democratic candidates, and (ii) the election of more Democrats automatically enhances the position of legislative leadership or influence of minority representatives. Indeed, the 2002 Interim Plan, under which a majority of Democrats was elected, did not prevent the loss of all minority chairmanships in the state senate.

Furthermore, the expectations of black legislators in Georgia does not definitively establish that the retrogression in Districts 2, 12 and 26 was necessary in order to achieve these legislators' objectives, or that the Democratic Performance index was an accurate proxy for future election outcomes. Insofar as the extent to which "Democratic Performance" data form the basis for predicting the outcome of future elections, the record does not indicate the full list of elections that went into the calculations, the character of those elections (statewide, local, etc.), or whether any of those elections was weighted more heavily than any other, from which the Court

might be able to come to conclusions about the reliability and significance of these statistics. Nor is there any testimony from witnesses that does so. In other words, the record does not establish any basis for concluding that a proposed district for which the State's Democratic Index is 51 percent (or any other particular number) is more likely than not to elect a Democrat. The fact that senators may have made such assumptions or relied upon this data does not make it, ipso facto, a reliable predictor of election outcomes. As discussed below, subsequent events have shown that this in fact was not a reliable predictor of the 2002 elections.15/

C. **The Court Should Reopen the Record**

The trial court on remand has broad discretion to reopen the record to new evidence, or evidence that was otherwise not considered at the earlier proceeding. Washington Mobilization Comm. v. Jefferson, 617 F.2d 848, 850 (D.C. Cir. 1980) (the district court has broad discretion to reopen the record if "newly discovered evidence changes the factual picture of a case to such an extent that, under the applicable legal principles, the district court would likely reach a different result."); Carter-Jones Lumber Co. v. LTV Steel Co., 237 F.3d 745, 751 (6th Cir. 2001) (holding that the district court did not abuse its discretion in allowing new evidence regarding "veil-

15/ This case provides an opportunity to test the assumption that these data were reliable. The 2002 election cycle was conducted under the 2002 interim senate plan precleared by this Court. As discussed in the following section, a Democratic majority was elected under the 2002 interim plan; this demonstrated that the retrogressive changes to Districts 2, 12 and 26 were not needed to do so. In addition, the 2002 elections showed that the Democratic Performance index was -- at best -- an unreliable predictor of Senate election outcomes. As the result of election-day losses by Democrats and defections by winning white Democratic candidates, over half of the districts with Democratic Performance indexes between 50 and 55 percent are now represented by Republicans.

piercing", when this issue was not considered in the earlier proceeding)16/; State Industries, Inc. v. Mor-Flo Industries, Inc., 948 F.2d 1573, 1576 (Fed. Cir. 1991) (holding that the district court was justified in reopening the record the legal standards addresses by the appellate court).

The United States respectfully submits that this is a case in which reopening the record is entirely appropriate. Indeed, as discussed above, the State cannot meet its burden on the present record, and unless the record is reopened, judgment would have to be granted for the United States. Analysis of "influence" districts and whether they offset retrogression already established is central to application of the new standard. The present record contains little, if any, evidence permitting an examination of how to measure "influence." Indeed, there has been no examination of electoral performance and behavior in districts which might be considered influence districts, nor is there sufficient evidence in the record to permit such analysis. Relevant areas of inquiry under the new factors enunciated by the Court, and regarding which Plaintiff failed to produce evidence, include, inter alia:

• Expert testimony regarding the meaning of election results, including racially polarized voting patterns, in districts other than Districts 2, 12, 26, particularly in districts identified as potential influence districts;

16/ The Carter-Jones court further stated that:

> "[The appellate court's] 'failure to specify that further evidence should be taken on remand could, at most, be construed as leaving a decision on the need to reopen the record to the sound discretion of the trial court.'"

Id. (quoting Skehan v. Board of Trustees of Bloomsburg State College, 590 F.2d 470, 478 (3rd Cir. 1978)).

• Expert and lay testimony regarding the willingness of legislators elected from districts with substantial black populations to take the interests of the black community into account, including the testimony of the legislators themselves and some of their black constituents; and

• Expert testimony regarding the extent, if any, of influence indicated in any district with a substantial percentage of black voters.

In addition, the results of the 2002 election and their aftermath were not available at the time of trial. But any examination of retrogression now, under the new Supreme Court standard, must include a close examination of this election.

After this Court denied preclearance to the 2001 proposed senate plan, Georgia adopted a 2002 interim senate plan which subsequently was precleared and under which the 2002 election cycle was held. The 2002 interim plan is identical to the 2001 proposed plan in 29 of the 56 districts and is nearly identical in terms of the BVAP percentage in sixteen other districts. The results from the elections conducted under the 2002 interim plan would provide highly meaningful evidence about the nature of the proposed 2001 senate plan. The United States is prepared to prove at least the following if the record is reopened:17/

• that in the 2002 general election, black incumbent senate majority leader Charles Walker -- one of Georgia's primary witnesses and a key architect of the 2001 plan -- was defeated by a margin of 50.4 to 49.6 percent in Senate District 22, which was identical under the 2002

17/ The information about the results of the 2002 elections is summarized in Attachment C. The information contained in this table can be found in Pl. Exh. 30D and at http://www.sos.state.ga.us/elections/results/2002_1105/senate.htm, and at http://www.legis.state.ga.us/icon/picbook.pdf.

interim plan to District 22 in the proposed plan, thereby showing that a fourth district in the proposed senate plan may be retrogressive in addition to Districts 2, 12 and 26;18/

• that the 2002 general election resulted in the election of ten black state senators as compared to eleven who had been elected under the benchmark plan;19/

• that in the 2002 general election, a majority of Democratic senators were elected, thereby proving that Georgia's stated goal of electing a Democratic majority in the senate could be achieved without resort to the retrogressive changes to Districts 2, 12 and 26 in the 2001 plan;

• that following the 2002 elections, a total of four white candidates elected as Democrats changed their party affiliations to Republican, causing a change in control of the senate from Democratic to Republican and the loss of all committee chairmanships held by black representatives from majority-black districts, thereby showing that the election of white Democratic candidates does not necessarily benefit black incumbents;

18/ Then-Senator Walker had testified on direct:

> Q: Now, in terms of an open seat, what is your opinion about the place where it's not necessarily a safe seat, but where an African-American candidate for Senate would have a fair or an equal opportunity to succeed to an open seat? What kind of BVAP level have you come to the opinion about would represent that point around Georgia?
>
> A: 40 percent and above. Generally around the state, I would feel comfortable at a 45% BVAP level.

Direct Testimony of Charles Walker, February 1, 2002, p. 12, lines 5-11.

19/ Past voting trends would suggest that these were candidates of choice for black voters, but expert testimony would be required to establish which of the winning and losing candidates actually were preferred by black voters.

• that nine of the seventeen senate districts with a "Democratic Index" between 50 and 55 percent are now represented by Republicans (six by election and three by defection), thereby indicating that the so-called "Democratic Index" data introduced into the record does not reliably predict election outcomes or party affiliations; and

• that black legislative influence does not necessarily prevail in districts in which black voters are unable to elect candidates of their choice. For example, in an important legislative vote, at least twelve of the thirty senators from districts with more than 25 percent BVAP -- among whom there were four Democrats including Senator Meyer von Bremen from District 12 -- voted in 2003 against the unanimous wishes of the Senate Black Caucus on the changing of the Georgia State Flag.

In summary, what limited evidence is available in the existing record on the impact of the proposed plan on black voters, when reviewed under the Supreme Court's revised standard, shows that although black voters are becoming a larger percentage of the voting pool in Georgia, the State is reducing their overall power. This limited record indicates retrogression. Second, while the subtraction of ability-to-elect districts is well documented in the present record, considerable additional evidence concerning the new areas of inquiry identified by the Supreme Court is now necessary to permit the "totality of the circumstances" examination required by the Supreme Court to determine the effect of the plan on black voters. Reopening of discovery and a trial on remand regarding these factors is required to do this.

IV. **CONCLUSION**

For the reasons set forth above, the United States respectfully requests that this Court defer entry of judgment on this remand pending the opportunity to conduct reasonable additional discovery, to supplement the record and to conduct such further proceedings as the Court deems appropriate. In the alternative, entry of judgment should be granted to the United States due to the Plaintiff's failure to meet its burden of proof under Section 5.

Respectfully submitted,

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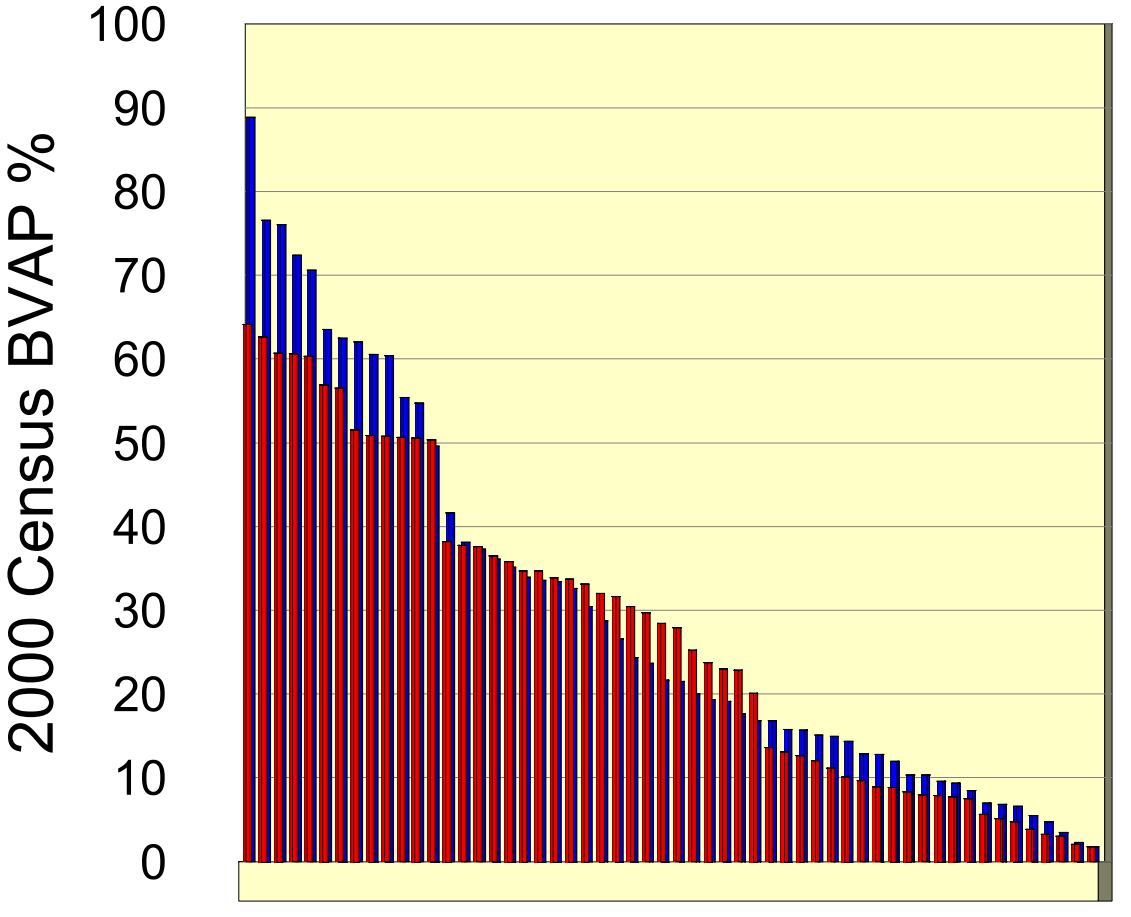
Attachment A				
Rank	**Benchmark District**	**2000 Census Benchmark BVAP %**	**Proposed District**	**2000 Census Proposed BVAP %**
1	43	88.91	10	64.14
2	38	76.61	43	62.63
3	35	76.02	35	60.69
4	55	72.40	55	60.64
5	10	70.66	38	60.29
6	22	63.51	36	56.94
7	26	62.45	39	56.54
8	15	62.05	22	51.51
9	2	60.58	15	50.87
10	36	60.36	26	50.80
11	12	55.43	12	50.66
12	39	54.73	34	50.54
13	44	49.62	2	50.31
14	14	41.62	23	38.15
15	11	38.08	25	37.80
16	3	37.34	41	37.65
17	25	36.12	29	36.50
18	20	35.12	14	35.82
19	34	33.96	44	34.71
20	33	33.59	8	34.65
21	23	33.42	16	33.90
22	29	32.63	3	33.73
23	8	30.44	20	33.06
24	13	28.70	33	31.98
25	4	26.61	11	31.69

26	19	24.38	4	30.51
27	18	23.62	40	29.67
28	7	21.68	6	28.45
29	27	21.47	13	27.91
30	16	19.97	5	25.24
31	46	19.40	7	23.76
32	24	19.09	47	23.00
33	32	17.59	19	22.88
34	45	16.83	46	20.05
35	41	16.79	24	13.56
36	1	15.83	31	13.06
37	5	15.68	42	12.64
38	30	15.07	18	12.08
39	17	14.90	52	11.11
40	6	14.33	28	10.08
41	28	12.85	30	9.70
42	9	12.80	9	8.88
43	47	11.99	1	8.79
44	52	10.33	37	8.33
45	42	10.30	17	7.97
46	40	9.57	56	7.84
47	37	9.39	50	7.68
48	31	8.49	48	7.47
49	48	7.02	32	5.60
50	56	6.86	21	5.07
51	21	6.57	45	4.79
52	49	5.44	27	3.78
53	53	4.78	54	3.24

54	50	3.52	49	2.99
55	54	2.34	53	2.07
56	51	1.75	51	1.77

Georgia Senate Plans

Benchmark (Blue) v. 2001 Plan (Red)



Attachment B

ATTACHMENT C				
Interim District	**2000 Census Benchmark BVAP %**	**Interim Democratic Index**	**Current Senator's Party**	**Current Senator's Race**
10	64.14	72.47	D	B
43	62.63	72.19	D	B
35	60.69	74.59	D	B
55	60.64	68.86	D	B
38	60.29	74.04	D	B
36	56.94	84.40	D	H
39	56.54	76.56	D	B
26	55.45	68.94	D	B
12	55.04	63.05	D	W
22	51.51	62.28	R	W
15	50.87	65.91	D	B
34	50.54	59.67	D	B
2	54.50	68.35	D	B
23	38.15	52.99	R*	W
25	37.75	56.02	D	W
41	37.65	53.47	D	W
29	36.86	54.03	R*	W
14	36.69	58.11	D	W
44	34.71	55.60	D	W
8	34.65	55.82	D	W
3	33.73	51.81	D	W
20	32.64	53.09	D	W
33	31.98	54.74	D	W
18	31.12	51.36	R	W
11	30.32	52.95	R	W

40	29.68	55.53	D	W
6	28.45	52.34	R	W
13	26.69	52.49	R*	W
4	25.85	45.45	R*	W
7	23.76	51.57	D	W
47	23.42	52.89	R	W
19	21.32	51.02	R	W
46	20.05	54.12	R	W
24	13.55	33.48	R	W
31	13.04	51.68	D	W
42	12.64	56.12	D	W
16	11.52	36.67	R	W
52	11.11	52.92	R	W
30	9.74	38.43	R	W
28	9.72	31.19	R	W
1	9.36	29.31	R	W
9	8.88	31.84	R	W
37	8.33	31.95	R	W
56	7.90	32.24	R	W
17	7.86	35.18	R	W
50	7.68	48.62	D	W
48	7.47	31.11	R	W
32	5.60	32.29	R	W
21	5.07	30.40	R	W
45	4.74	31.40	R	W
27	3.60	28.12	R	W
54	3.24	43.56	R	W
49	3.12	36.34	R	W

53	2.07	37.97	R	W
51	1.80	37.94	R	W

***** Switched from the Democratic Party to the Republican Party after the 2002 election.

CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2003, I served or caused to be served a copy of the United States' Response to Order to Show Cause by e-mail and facsimile, to the following counsel:

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